87-627

No.: _____

IN THE

Supreme Court of the United States

October Term, 1987

JOSEPH TOMASELLO,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether or not a conspiracy to receive stolen property from interstate commerce, pursuant to 18 United States Code, Section 659, can be sustained when no theft ever occurred and no goods were even stolen from interstate commerce.

2. Whether or not a conviction for conspiracy to receive goods stolen from interstate commerce requires a specific knowledge that the goods were moving in or were a part of an interstate shipment.

3. Whether or not this Court's decision in United States v. Feola, 416 U.S. (1974) should be restricted to its own facts based upon considerations involving the protection of the public's interest to be protected, namely personal assaults on federal officers.

4. Whether or not Congress in enacting 18 United States Code, Section 659 intended to require knowledge that the property was stolen or moving in interstate commerce, whereas in enacting 18 United States Code, Section 111,

due to the need to protect federal officers, such a knowledge was not intended. In other words, whether Courts should treat the intended requirements of both statutes differently.

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PRELIMINARY STATEMENT

This is an appeal by Petitioner, Joseph Tomasello, from a judgment of the United States Court of Appeals for the Second Circuit, decided June 23, 1987, with a four-page opinion, which affirmed a judgment of the United States District Court for the Eastern District of New York (Hon. I. Leo Glasser), rendered on February 19, 1987, convicting

Petitioner of the crime of conspiracy, pursuant to 18 United States Code, Section 371. He was convicted together with one, James Angellino, of conspiracy to deal in stolen property, to wit: Video Cassette Recorders, in violation of 18 United States Code, Section 659. Petitioner was sentenced to a year and a day, and was allowed to remain at liberty pending appeal. After the United States Court of Appeals for the Second Circuit affirmance he voluntarily surrendered and is presently incarcerated.

JURISDICTION

The jurisdiction of the Court is invoked under Title 28 United States Code, Section 1251. The opinion of the United States Court of Appeals for the Second Circuit is annexed hereto.

STATUTES INVOLVED

18 U.S.C., Section 371	Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any

act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C., Section 659 — Interstate or foreign shipments by carrier; State prosecutions

Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any pipline system, railroad car, wagon,motortruck, or other vehicle, or from any tank or storage facility, station, station house, platform or depot or from any steamboat, vessel, or wharf, or from any aircraft, air terminal, airport, aircraft terminal or air nagivation facility with intent to convert to his own use any goods or chattels moving as or which are part of or which constitute an interstate or foreign shipment of freight, express, or other property; or

Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been embezzled or stolen; or

Whoever embezzles, steals, or unlawfully takes, carries away, or by fraud or deception obtains with intent to convert to his own use any baggage which shall have come into the possession of any common carrier for transportation in interstate or foreign commerce or breaks into, steals, takes, carries away or concelas any of the contents of such baggage, or buys, receives, or has in his possession any such baggage or any article

therefrom of whatever nature, knowing the same to have been embezzled or stolen; or

Whoever embezzles, steals, or unlawfully takes by any fraudulent device, scheme, or game, from any railroad car, bus, vehicle, steamboat, vessel, or aircraft operated by any common carrier moving in interstate or foreign commerce or from any passenger thereon any money, baggage, goods or chattels, or whoever buys, receives, or has in his possession any such money, baggage, goods or chattels, knowing the same to have been embezzled or stolen -- ...

FACTS

The essential nature of the litigation below involved the Government's claim that Petitioner, Joseph Tomasello,conspired with one, James Angellino, to purchase some video cassette recorders, commonly known as VCRS, from an informant acting at the direction of law enforcement.

There is a question as to whether or not Petitioner knew the VCRS were stolen, inasmuch as there was no specific representation made by the informant that they were, but the facts are that the VCRS were in truth never stolen, but were supplied to the informant by the police, and the Government intended to have

their informant make both defendants think that the VCRS were in fact the subject of a theft.

This case was tried to a jury in November, 1986, Honorable I. Leo Glasser presiding, and Petitioner was charged with conspiring to buy and possess stolen goods, although the goods were never actually stolen. A Government informant, Ralph Schnidman, who the defendants knew as Ralph Marino, agreed to work for the New York City Police Department. He had a long history involving fraudulent credit cards, burglaries and bookmaking, and in February, 1984, when he said he had gotten involved with loansharking, he approached the New York City Police Department, and in return for having the police pay off his loan, he agreed to open up a store and pretend to be a receiver of stolen property (42)*. The store was actually set up on 86th Street and Third Avenue in Brooklyn at police expense, and during that

* Numerical References are to Pages of the Trial Minutes.

period he came to know a James Byrnes, who was really James Angellino, in the course of operating his store on 86th Street (44). Marino's store closed in November, 1984, and after that date, more precisely in January, 1985, the Federal Bureau of Investigation contacted him, and he agreed to approach James Angellino and other people. On January 28, 1985, he met Angellino at the Pier 86 Pet Shop in Brooklyn, which was apparently legitimately operated by Angellino, and he also saw Petitioner there. The witness was asked to identify Tomasello in Court, but pointed out Mr. Tomasello's attorney instead (47). At any rate, on January 28th he met both men and apparently told them that he had a load of VCRS and television sets (51). The witness was asked what he meant when he used the term, "a load" of VCRS and television sets, and over objection the answer was given that he meant stolen merchandise (51). Of course, there was no testimony to that point that either defendant

knew the term referred to stolen merchandise. At any rate, the conversation was recorded, played for the jury and a transcript was given to them (A24-A26)*. The date of the conversation was January 28, 1985. Thereafter, the witness met again with Angellino alone on February 8, 1985. The tape was received in evidence, although Tomasello was not present (24-A26). The meeting occurred next door to Angellino's pet shop (57). Apparently it was received as co-conspirator testimony subject to a later ruling by the Court. The witness was asked after the tape was played who Angellino referred to when he said he had to call "that guy", and Schnidman answered, over objection, that it was the Petitioner. Another meeting occurred on February 11th with both men at the pet shop, when Schnidman told them that he had a load of VCRS and televisions and he needed a buy in (64). Schnidman testi-

*"A" References are to Pages of the Appendix in the Court of Appeals for the Second Circuit.

fied that a buy in meant that he needed a sum of money and in return a truck driver would give up his load of merchandise, which was basically that the truck driver would agree to stage a hijack for money (64). Also, the witness testified that he sold the defendants nine video cassette recorders. Jimmy said as he was leaving, "So when you get him", and the witness said, "Alright, when I get him", and Jimmy replied, "Yeah". That meant when he got the load he had to let them know and they would do business. At one point during the conversation, Schnidman left the store and put nine VCRS in the trunk of Angellino's car (70). The F.B.I. was monitoring the whole conversation in addition to the fact that it was being tape recorded.

Schnidman testified that the VCRS he sold that day on February 11th were brand new in sealed boxes and, in fact, had not been stolen. They were actually given to him by the F.B.I. for use in that operation (72). Schnidman

testified that on that occasion he received $1,500.00, but did not recall which man gave it to him, and he turned it over to F.B.I. Agent Dennis Maduro, who was one of the surveillance agents monitoring the conversation.

Schnidman testified that Angellino called him at his house and asked him to get a VCR on February 17, 1985. The men met and the conversation was recorded (A29-A33). Tomasello was not present. Supposedly Angellino asked Schnidman if it was a give up load. The witness testified that it meant that it was stolen merchandise (A35). Angellino then said, "Joey is away. I will get together with him. Maybe we'll buy the load". Schnidman said he was paid for the VCR and television set he delivered on that occasion and turned over the money again to the same F.B.I. agent. That was a four head VCR, according to the witness, which was more expensive than the two head model, and then the witness put the VCR and the television in the back of Angellino's car. On February 20th, he got

a similar call from Angellino, which was recorded (A37-A38), in which it was discussed that Angellino had requested Schnidman to meet some of his friends in front of the Coliseum, but Schnidman couldn't make it. There was another meeting at Lolly's Candy Store in Brooklyn on February 20, 1985 (A39-A43), again only with Angellino, and the word, "load", was again used, and the witness claimed he got $15,000.00 for the whole load. He said that the normal price was between $77,000.00 and $80,000.00, but the price of between $15,000.00 and $16,000.00 for the whole load was the price you usually get on the street, it being about one-third of the actual worth (A40). A meeting was arranged for the Coliseum the next day for the purpose of Schnidman selling the rest of the VCRS and television sets that he had, and a meeting actually occurred where Angellino was present, as were some of his friends (A44-A61). These men were basically union workers who worked at the Colisum and apparently were

friends of Angellino. They ordered twenty-one BCRS VCRS among them (A55). Later that same day, February 21st, Schnidman met both defendants at Lolly's Candy Store (A62-A69). After a lot of small talk about friends and places, he was left with an order of two television sets for Petitioner (A67). There was another similar conversation with Angellino, and then the next day he was supposed to meet Angellino and another man to deliver the sets to the Coliseum that had been discussed the day before (A70-A71). The meeting never occurred and the witness never met either defendant until he saw them in Court.

On cross examination the witness testified to all sorts of illegal activities, including using cocaine on different occasions (40-42). He also admitted that the first time Angellino came into his store it was just to look around, and Angellino told Schnidman that if he could get ahold of any television sets or VCRS to let him know, but it was apparently a legiti-

mate store, so that Angellino's request did not in any way refer to hot or stolen VCRS or televisions (51-52). In fact, quite significantly, Angellino never requested any stolen items (52), and when the point came that the witness told Angellino he had some items for sale, the witness clearly admitted that he did not tell Angellino that the items were stolen, and never during any of the times in which the men conversed did he ever use the words, "hot", "stolen" or "bad". Also, Angellino never asked him whether any of the items were hot or stolen (53-55). In fact, in one of the transcripts (A50), there is, in fact, even a statement to the effect, "I think they are both good". That conversation occurred in August, 1984 (55). Between that time and the first time television sets were mentioned on January 25, 1985, a period of about six months had elapsed, and there were no conversations between them and Angellino never asked for any hot items (57).

The witness also admitted that he had re-

ceived about $40,000.00 in assistance from the Government up to that time (59), but the total appeared to be closer to $50,000.00-$60,000.00. The witness also admitted that on August 8, 1984 the Police Department was aware that Angellino wanted to buy a VCR, just a VCR, not a hot one (74). It was the F.B.I. who told Schnidman that he should say that the VCR came from New Jersey (74-75), and the witness admitted that during January and February Angellino never asked him where the items came from (75). It was Schnidman who first mentioned New Jersey, and that was only after two meetings had occurred and the nine VCRS had already been sold and loaded in Angellino's car (75). The witness conceded that he never told Angellino these items were stolen, and Angellino didn't know how many VCRS he was going to get on that occasion. It was the F.B.I. who decided to bring in nine, and even at that Angellino didn't have the money on him to pay for them at that time (78). During the two conversa-

tions on February 8th, the witness admitted that he still had not said the goods were stolen (91), and on February 17th, which was when the VCRS were sold, the term, "stolen goods" had still not been mentioned (92). In other words, after four meetings had occurred and some VCRS had been sold, he had never given the defendants reason to believe that the merchandise was stolen, nor did he specifically tell them that they were stolen (94). The witness explained that by simply saying you couldn't get that kind of merchandise for that particular price without it being a little strange, but when asked if it would change his opinion if an expert testified that VCRS were available for the price, the witness answered it would surprise him, but "yes" (94). Schnidman said the main reason he thought Angellino knew that the goods were stolen was because of the price for the nine VCRS which was $5,200.00 (97). At any rate, the witness calculated that the price came to $150.00 to

$175.00 a unit (97), but a discussion ensued at the Colisum because Schnidman wanted to charge $200.00, and Angellino said, "Why don't you just charge them $175.00", which was the price actually paid. The witness related that Angellino never asked him for any part of the money that he got from the Coliseum purchasers and, in fact, when Schnidman wanted to charge $200.00, Angellino knocked it down to the same price he had paid because apparently he was not looking to make any money, but just help his friends make a good transaction (99). The witness said the transaction at the Coliseum was a direct sale from him to the different people who were friends of Angellino. Angellino wasn't even the middle man and told him to deal directly with the people, set the price himself, make a profit, but give them a good deal (102). In fact, the witness never mentioned on February 21st that the goods he was selling at the Coliseum came from the same truck he

supposedly told Angellino had been given up (104).

Of all of the conversations, it was only three occasions when Tomasello was present, January 28th, February 11th and February 21st (109). The total time the witness spent in Petitioner's presence during all three conversations was no more than five minutes (109), and he also never told Tomasello that the goods were stolen (109). He also did not recall whether he mentioned to Tomasello where the goods came from. Schnidman also said that prior to his arriving at the pet shop, Tomasello had no knowledge that he was going to bring VCRS with him, and that on the first occasion, January 28th, Tomasello was only interested in buying one or possibly two VCRS (111). There was no mention of New Jersey on that occasion (127-128), and after the third and last occasion when he met Tomasello, February 21st, about four or five hours later he got a call from Angellino telling him to cancel

the order that he didn't want them (129). Going back to the 11th, Tomasello said he didn't want them to give Schnidman any money, that he didn't want any part of the deal, but the witness went ahead and bought in the merchandise anyway (129-130).

Schnidman admitted that in reality there was no deal, there was no driver, no stolen goods, no goods that came from New Jersey, and he had gotten the merchandise from the Government (130). After the 11th, he didn't deliver anything to Tomasello (132). The witness then corrected himself, and said that the previous price he was talking about, apparently the $5,200.00, was inaccurate. He meant twenty-five VCRS at $200.00 a piece (135). When he delivered the nine VCRS on February 11th, he wanted $200.00 each, but Tomasello forced him down to $150.00 for each one (135). Neither man asked for a bill of sale, but on the other hand he did not offer one (140). Schnidman felt when the VCRS were delivered

in his car in front of the store he didn't feel he had to tell the defendants they were stolen because they were getting a substantial reduction from the retail price (140-141).

A stipulation was entered that if Tony Cianci were called to testify he would testify that he was the general manager for the Panasonic Company, that all VCRS were manufactured in Japan and shipped to the United States, and that the television sets sold on February 17, 1985 were manufactured in Chicago (204). If Ellen Gidden were called, she sould testify that she worked for the Fisher Corporation and all Fisher VCRS were manufactured in Japan and sent to California or New Jersey for distribution. In addition, all Fisher television sers were manufactured in Arkansas (204). If Paula Duffy were called, she would have said she was an attorney for the Sony Corporation, and basically all Sony's were manufactured in Japan (205).

The Government rested, and after the Court

found that there was enough independent evidence to allow the co-conspirator statements in evidence, Rule 29 motions were argued and denied.

Defendant Angellino put on one, Vincent Scura, as a witness, who basically testified that he spoke to Angellino, who told him he bought a VCR at wholesale for $170.00, and the witness said he bought one from Angellino, gave him the $170.00 and still has the VCR (215). Ann Scuro, the mother of the previous witness, also asked Jimmy to pick one up for her for the same $170.00 price, which he did (221), and she said she knew Angellino for fifteen to twenty years. The witness testified she tried to buy one around Christmas, and then figured the price would go down after Christmas. Angellino never said that the VCR came from a hijacked load (221-222).

Petitioner called Joseph Bermudez to the stand. He said that in February he bought a VCR from Tomasello for $170.00, and had known

him for twenty years. He didn't ask Tomasello for a bill of sale because they were very close friends (226). The witness said he thought that the price was good, but he had occasionally seen lower prices (229). If he knew it had been stolen from a truck, he would not have bought it (230).

Donna Turco testified that she knew Petitioner for years. She drove a school bus and also bought a VCR from him for $170.00 and didn't get a bill of sale because they were friends (232).

Tomasello rested, and Angellino called one more witness, Daniel Yagos, who had been a New York City police detective for seventeen and a half years. After he left the Department, he operated a family video store in Staten Island. He testified that as part of his duties he purchased tape machines, television sets and VCRS (237). The witness testified that the price of a VCR fluctuates right after Christmas, and wholesalers sometimes

buy a load of VCRS before the holiday, anticipating their sale. Any left over machines are subject to price reduction because new units are always coming out and there is generally a dramatic drop of prices after Christmas, both on the wholesale and retail level (238). He described the different types of machines and testified that there is a great variety even between machines of the same brand (239), and sometimes companies like The Wiz sell at reduced prices all the time or sell reconditioned used units as new ones. Units sometimes are damaged in shipping, but are fully warranted and sold in factory packages (240-241). The witness described the different methods of buying VCRS - sometimes from wholesalers, sometimes from independent wholesalers. The gist of his testimony was that a load could be anywhere from four to fifty items, that the price was usually lower if more than a few units were being purchased, and he said specifically that it was possible to buy

twenty-five to thirty units from a wholesaler and resell nine of them to soneone for $170.00, depending upon how many were purchased and how many of the units were going to be sold at higher prices (244-246). He also testified that if an independent wholesaler sold a unit to him for around $170.00 it would not arouse his suspicions (245-246). He also said on many occasions when he requested certain items and asked wholesalers whether they could be obtained he did not mean they were trying to steal these items (248-249), and he said he had personal experience as a detective because he has made hundreds of arrests for stolen property over the years (250). In his experience, he has seen whole loads of electronic equipment for sale to the general public and, in fact, he had seen one a week prior to his giving testimony (250-251). He also said anybody could buy a whole truckload or cooperate with other people in buying part of a truckload, and the mere fact that the

items were sold at a lower price did not give rise to any suspicion that they were stolen (251-252). Mr. Yagos also testified that the bigger the load the cheaper the cost, and that the VCRS would come packed in their regular cartons in styrofoam with the warranty card included, so that anyone who purchased the machines would be covered by the warranty (253). He also said that a few years before testifying he bought a load himself and then sold the units by calling different people who were in the business and who wanted to buy some of the machines. He bought the whole load and then resold them, and he mentioned, for example, that if he bought a whole load and resold most of it, and had only a certain quantity left he would have already made his money back, so he could sell the last thousand out of ten thousand for less money (254-255). He would still have made a profit on the entire deal, and he also added that no licenses were required and receipts are not usually given out unless the customer asks for one (256-258). The absence

of a receipt does not give rise to the conclusion that the items were stolen (258).

On cross examination the witness said that where the items were purchsed for himself it would normally not make a difference whether he got a receipt or not (269).

The Court charged the jury that the defendants would have to have known that the goods were stolen (417), and that the unlawful agreement that the Government talked about was an agreement to receive stolen goods that were moved in or a part of interstate commerce (419). The Court specifically acknowledged that it was a requirement that the defendants knew the goods were stolen, but the Court told the jury that the Government did not have to prove that the goods were actually stolen (423). In other words, the Court took the position that the defendants could be found guilty of conspiracy even though the crime had not been committed and, in deed, even have been impossible to commit (424). Defense counsel specifi-

cally objected to the Court telling the jury that the Government did not have to prove the goods were moved in interstate commerce (436).

The jury after getting the case for deliberation listened to all of the tapes again (439-442), and then both defendants were found guilty.

POINT I

A CONVICTION FOR CONSPIRACY SHOULD NOT BE PERMITTED BASED UPON KNOWLEDGE THAT GOODS WERE STOLEN WHEN IN FACT NO THEFT EVER OCCURRED.

In the recently decided case of United States v. Golomb, __F2d__, decided February 13, 1987, the Second Circuit vacated convictions on two counts of receiving stolen property in violation of 18 United States Code, Section 641, because the property involved was not stolen. In that case, Golom purchased United States Treasury checks on two consecutive days from an undercover Secret Service agent who led the defendant to believe that the checks had been stolen. The truth is that the checks were never stolen but were "bait" checks which displayed a fictitious name and address and were printed by the Government specifically for use in investigations. Thus, the checks Golomb purchased were not, nor had they ever been stolen.

Section 641 authorized prosecution of someone who received money or property belonging to the United States with intention to con-

vert it, "knowing it to have been embezzled, stolen, purloined or converted". United States v. Golomb, supra, Opinion at Page 1500.

It was held that Golomb's contentions that he could not have known that the checks were stolen when they were not in fact stolen was correct, and the Second Circuit recognized that knowledge and belief are very different mental states, knowledge implying a much higher degree of certainty than belief. Therefore, whether or not Golomb may have believed that the checks were stolen cannot support a conviction when the property in issue had never been stolen.

An almost identical situation appears in the case at bar, even though the statute involved is 18 United States Code, Section 659, dealing with interstate or foreign shipments, because the statute makes it a crime to buy, receive or possess any goods or chattels which are moving in or are a part of an interstate shipment "knowing the same to have been em-

bezzled or stolen."

Here, like in the Golomb case, the Government created the crime and, in fact, the VCRS and television sets were apparently legally purchased by the Government in order to create the potential crime and prosecute the defendants. The question is thus presented that where the substantive crime is incapable of being committed because the goods have not been stolen, can a conspiracy to steal these same goods be sustained. This Court previously denied certiorari when that question arose in United States v. Muzii, 676 F.2d 919 (2nd Cir.), cert. denied, 459 U.S. 863 (1982). Other Courts have held that knowledge that the goods were stolen is equally required for a conspiracy charge or a receiving charge. United States v. Zarattini, 552 F.2d 753 (7th Cir.), cert. denied, 431 U.S. 942 (1977); United States v. Flaherty, 668 F.2d 566 (1st Cir. 1981). One can assume, strictly as an academic issue, that it is possible to contem-

plate violating the law when the actual violation is impossible, but it would seem quite an unfair matter to make conspiracy a crime to do something which could not possibly be accomplished, like planning to steal the moon, which, of course, is a physical impossibility.

In the Muzii decision, a case which involved a conviction for receiving and possessing goods moving in interstate commerce, the question was whether or not the goods lost the interstate character because of a temporary possession by the police, and the Court decided that the pharmaceuticals involved did not lose their interstate nature because the actions of law enforcement officials amounted to no more than mere surveillance or observation and did not constitute actual or constructive possession. The appellant was also convicted of conspiracy, a conviction which obviously was proper, since the substantive act was sufficient. Judge Kaufman, writing for the Court, noted at Page 922, footnote 9, that

even if the goods had lost their stolen character prior to delivery to Muzii, which the Court did not hold, he still could have been convicted of conspiracy since the evidence was ample to support the existence of a conspiracy. Citing United States v. Egger, 470 F.2d 1179,1181 (9th Cir. 1972), cert. denied, 411 U.S. 949 (1973).

In the Muzii case, the substantive crime was clearly capable of being committed, and was committed, the only question being whether or not the property had lost its interstate status. In the case at bar, the crime was not capable of being committed because it was a sham created by law enforcement, and the goods had never been stolen and had never been in interstate commerce. In the Egger case, the substantive act was capable of being committed, and the F.B.I. conduct amounted only to a form of observation and surveillance rather than possession, so that the goods did not cease to be part of interstate

commerce. In Egger, the defendants were found guilty of both the conspiracy and receiving counts and there was ample evidence to support both. That case did not support the proposition that where a substantive crime is incapable of being committed because the goods were not stolen then a conspiracy could also lie.

We think that this Court should consider the purpose of 18 United States Code, Section 650, which obviously is the intention of Congress to protect goods moving in interstate commerce from theft. United States v. Johnson, 612 F.2d 843 (4th Cir. 1979); United States v. Waronek, 582 F.2d 1158 (7th Cir. 1978). There is no protection of goods moving in interstate commerce when the particular situation does not in fact involve goods which are in reality a part of interstate or international trade. Creating a sham crime and enticing Petitioner to conspire to commit the non-existant crime does not advance the interests which Section 659 was enacted to protect.

The situation also is one which seems to be basically unfair, since a Government created crime is not something which is generally encountered, especially where the creation is intended to trap an individual rather than right a general wrong existing in society.

It is most respectfully submitted that if knowledge rather than belief is required to commit the substantive crime and that crime cannot be committed because the goods were not stolen, then the same rule should apply for conspiracy. We must not forget that the conspiracy in this particular case is to commit a specific crime with regard to specific VCRS and television sets, not a conspiracy to violate the federal law in general. Inasmuch as the conspiracy is specific, then the knowledge must be specific, so that there cannot be a conspiracy to steal these items with the knowledge that the items were stolen where the items were in fact perfectly legal.

It should also be noted that even accepting the contention discussed elsewhere that United States v. Feola, 420 U.S. 671 (1975), no longer requires knowledge of the interstate nature of the property regarding a conspiracy charge, that decision did not remove the requirement that the conspirators have knowledge of the stolen character of the property. That is a separate and distinct issue. The decision in United States v. Giordano, 693 F.2d 245 (2nd Cir. 1982), is interesting. In fact, in that case the interest to be protected was business establishments used in activities affecting interstate commerce, and there was no issue of whether the crime was created by the Government. The Court indicated that the federal concern of the statute was Congress' intention to protect these bery businesses, a concern which is generally not furthered by creating crimes and inducing people to enter conspiracies, when at the outset they had no intention of violating the law or conspiring to steal

property or do other things which affect the federal interstate concern. In that case, the contention was that the Government failed to prove that the building sought to be destroyed was used in activities affecting interstate commerce, but at least there was a valid contention on both sides. In the case at bar, since the goods never were stolen and since they had been purchased by the Government after they apparently came to rest and ceased to be in interstate commerce, neither was the requisite knowledge on the part of the Petitioner proven, nor could the goods have ever be considered to be part of an interstate shipment on the date that the conspiracy apparently began.

POINT II

INASMUCH AS THE GOODS WHICH WERE THE SUBJECT OF THIS CONSPIRACY PROSECUTION WERE NEVER STOLEN, THEY WERE NEVER A PART OF INTERSTATE COMMERCE. KNOWLEDGE OF MOVEMENT IN INTERSTATE COMMERCE SHOULD BE A REQUIREMENT IN THE CONSPIRACY PROSECUTION.

There are two significant aspects that must be considered when one deals with the crime of conspiracy to violate 18 United States Code, Section 659, the theft or receiving of goods stolen which were moving in interstate commerce.

The Second Circuit recently held in United States v. Golomb, supra, decided February 13, 1987, and discussed in Point I herein, that a conviction for knowingly receiving stolen government property, which in that case was United States Treasury checks, could not stand when the property was not actually stolen. In Golomb, the statute involved was 18 United States Code, Section 641; whereas in this case it is Section 659, but both statutes require a buyer or receiver of stolen property to have knowledge that the same was embezzled or stolen.

In Golomb, it was decided that knowledge implied a much higher degree of certainty than belief, and while the checks in Golomb were not actually stolen but were created by government officials as part of a plan to nab Golomb, it was impossible to have knowledge of the fact that the checks were stolen, when in truth they were not. Obviously, that same principle applies to this case, since the officials here legally purchased the VCRS and television sets and instructed the informant, Schnidman, to attempt to sell them to the Petitioner, the truth of the matter being that the merchandise was never stolen. Obviously, that is the reason why Tomasello was indicted for conspiracy and not for the substantive act.

Thus, the question is presented as to whether you can have a conspiracy conviction for conspiring to receive property stolen from interstate commerce where the property has never been stolen and a substantive crime is impossible to sustain. The knowledge of the

fact that the merchandise is stolen is the issue, but a second issue is also presented, and that is whether or not the co-conspirators must be shown to have knowledge or have belief that the property which they were conspiring to steal or receive was not only stolen but also that it was moving in interstate commerce, or whether it was part of or was itself an interstate or foreign shipment.

There is a long line of cases in the Second Circuit which held that in order for a conspiracy to receive or steal property moving in interstate commerce to be sustainable the co-conspirators must have had specific knowledge that the subject of the theft was moving in or was part of an interstate shipment. The doctrine was exemplified by the decision in United States v. Crimmins, 123 F.2d 271, (2nd Cir. 1941), and a whole list of other cases which were based upon sound considerations when the doctrine was announced, and Petitioner submits are still sound today.

In United States v. DeMarco, 488 F.2d 828 (2nd Cir. 1973), it was held that not only was it necessary for the Government to prove that the goods were stolen and that they were stolen from an interstate shipment on a substantive charge, but with regard to the crime of conspiracy it was necessary to charge the essential element of that offense which was that the defendants had to have knowledge that the goods came from an interstate shipment. The Court referred to Learned Hand's classic phrase:

> "While one may, for instance be guilty of running past a traffic light of whose existence one is ignorant, one cannot be guilty of conspiring to run past such a light, for one cannot agree to run past the light unless one supposes that there is a light to run past."

United States v. Crimmins, supra, at 273.

The doctrine was followed in United States v. Cangiano, 491 F.2d 906 (2nd Cir. 1974), an opinion which cited DeMarco with approval and also referred to Learned Hand's opinion in United States v. Crimmins, supra, and the Court listed a whole line of cases, including

United States v. Vilhotti, 452 F.2d 1183 (2nd Cir. 1971), cert. denied, 406 U.S. 947 (1972); United States v. Alsondo, 486 F.2d 1339 (2nd Cir. 1973); and other cases cited in that opinion. United States v. Vilhotti, supra, at 1189. It is interesting to note that in Vilhotti the Government asked the Second Circuit to overrule the long line of cases which had decided the proof of knowledge of the interstate nature of the crime was necessary. Thereafter, in United States v. Mauro, 501 F.2d 45 (2nd Cir. 1974), the Second Circuit held to its previous decisions with regard to the Crimmins doctrine, and the opinion, which we will discuss hereafter, also made some very interesting observations. However, the Court noted that this Court had at that time granted certiorari in United States v. Feola, supra, and that this Court was going to consider the decision in United States v. Alsondo, supra, and presumably answer the question.

This Court, when it decided United States v. Feola, supra, did not essentially change the law as it existed.

In fact, the Circuit Court, in United States v. Viruet, 539 F.2d 295 (2nd Cir. 1976), noted that the Feola decision did not expressly overrule United States v. Crimmins, supra, although the question of scienter in the two statutes was closely parallel. In Feola, the case involved a conspiracy to assault a federal officer, and that the status of the object of the conspiracy being a federal officer was a jurisdictional fact, knowledge of which was not required by the co-conspirators. While Feola did not expressly consider 18 United States Code, Section 659, the question of an actual theft required under that statute was basically jurisdictional, and it seemed that a conspiracy to commit such acts without proof that the defendant knew about the jurisdictional fact was a logical conclusion to be drawn from the Feola ruling. We submit that such conclusion is not inescapable.

In Feola, this Court discussed at great length the primary purpose that Congress had in mind when it enacted 18 United States Code, Section 111, the statute prohibiting assaults on federal officers. The Court concluded that among other things there was a great need to protect agents enforcing the federal criminal laws. Obviously, that would give rise to the idea that agents could be better protected if specific scienter requirements were not included in the law, since it would be harder to convict people who assaulted or abused federal officials. A statement made by this Court, however, is of considerable interest.

This Court said:

> "A contrary conclusion would give sufficient protection to the agent enforcing an unpopular law, and nothing to the agent acting undercover."

United States v. Feola, supra, at 1264, emphasis added.

It comes to mind that in a great many situations it would be impossible to prove that an

assailant knew his victim was, for example, an F.B.I. agent or a D.E.A. agent, since there are so many instances where the operations are covert and the agents are acting in an undercover capacity. Such a situation is quite common and there is no problem in recognizing the specific need to protect officers who act in such a manner. However, the Court in announcing its decision clearly held that wehre a substantive offense embodies only a requirement of mens rea to one of its elements, the criminal federal conspiracy statute requires no more. United States v. Feola, supra, at 1267.

The Court also said:

> "...where knowledge of the facts giving rise to federal jurisdiction is not necessary for conviction of a substantive offense embodying a mens rea requirement, such knowledge is equally irrelevant to questions of responsibility for conspiracy to commit that offense."

United States v. Feola, supra, at 1269.

It would seem that it was not necessary for this Court to extend its decision beyond the facts of that case, and it was observed in United States v. Viruet, supra, that this Court did not specifically overrule the Crimmins or Alsondo decisions. In fact, it was very acutely recognized in the Mauro case that different situations require different approaches. For example, members of the general public would not be expected to recognize whether an agent acting in an undercover capacity was in truth an agent, because obviously he would attempt to hide his identity. In addition, to require a conspirator to have knowledge of the legal status of a banking institution, in other words, membership in the Federal Reserve System or the Federal Deposit Insurance Corporation, is, as this Court said:

> "...not normally within the ken of those who undertake the activities sought to be discouraged."

United States v. Mauro, supra, at 51.

In other words, not every theft, robbery or burglary involves interstate commerce, thereby invoking federal jurisdiction, but by the very terms of the conversations or plans of the conspiracy the objective of the conspiracy often involves a theft from a carrier, a warehouse, goods which are in transit or other situations where it is clear tc the people themselves that they are dealing with merchandise which is either moving in interstate commerce or constitutes part or all of an interstate shipment. The practical approach makes it clear that, for example, people who are planning to steal Panasonic VCRS from a loading platform must be charged with the knowledge that the VCRS were shipped from somewhere to somewhere, that they are basically a Japanese product and that interstate commerce must in some manner be involved.

It seems that this practical approach is proper because it preserves the traditional

concept that parties to a conspiracy must have knowledge of each and every element of that conspiracy.

It was observed in the Mauro case that Congress probably never intended that knowledge of certain restrictive legal and financial relationships be proven before a defendant can be found guilty of conspiracy to violate the statute, and the federal status probably was only inserted in the statute to create federal jurisdiction, not as an element of mens rea of the conspiracy. It is clear, however, that that rationale does not apply to the situation that we are dealing with in this case for the reasons stated above.

The jury was not charged that they had to find that the conspirators were aware of the interstate commerce aspect of the case, but even though the specific charge was not requested, it has been recognized that the failure to include a necessary element of

the crime in the charge is plain error and is reversible without the necessity of an objection or request. United States v. Golomb, supra; United States v. DeMarco, supra, at 832.

CONCLUSION

THE PETITION FOR CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 23rd day of June, one thousand nine hundred and eighty-seven.

Present: HONORABLE JON O. NEWMAN
HONORABLE RALPH K. WINTER
Circuit Judges
HONORABLE DUDLEY B. BONSAL,
Senior District Judge*

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UNITED STATES OF AMERICA,
Appellee,

v. 87-4113
87-4114

JAMES ANGELLINO and JOSEPH TOMASELLO,
Defendants-Appellants.

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O R D E R

James Angellino and Joseph Tomasello appeal from judgments entered by the District Court for the Eastern District of New York (I. Leo Glasser, Judge) convicting them, after a jury trial, of conspiring to buy and receive

*Of the United States District Court for the Southern District of New York, sitting by designation.

electronic goods stolen from an interstate shipment, in violation of 18 U.S.C., Sections 371, 659 (1982). Angellino and Tomasello were implicated in a "sting" operation orchestrated by the FBI in which an FBI informant posed as a seller of stolen televisions and videocassette recorders and sold to the defendants equipment that has been supplied by the FBI.

1. Appellants contend that because the goods they purchased had not in fact been stolen, their convictions for conspiring to buy and sell stolen goods must be reversed. This Court had held, however, the conspiring to commit a crime is punishable even though consummation of the substantive crime would be impossible. See United States v. Giordano, 693 F.2d 245,249 (2d Cir. 1982). To have a conspiracy "it does not matter that the ends of the conspiracy were from the beginning unattainable." Id. (citations omitted).

2. The Government presented sufficient

evidence to support a finding by the jury that Angellino and Tomasello thought that they were purchasing stolen merchandise. The evidence disclosed that during a conversation in which Angellino and Tomasello bought nine videocassette recorders from the informant, Tomasello asked whether televisions were also available. The informant responded that he needed $2,000 to purchase a truckload of televisions from a driver who wanted " to give up the load." The informant testified that "giving up a load" was a street phrase that meant the driver would agree to stage a hijacking in return for payment. Appellants' understanding of this term is clear from Tomasello's affirmative response and Angellino's later conversation regarding a load of televisions in which he asked the informant "What was it[,] to give up a load?" The evidence further disclosed that the informant told appellants the videocassette

recorders he was selling for $200 or less cost $599 at retail stores; the transaction was made with no receipts or bills of sale; the appellants asked for no documentation; and Tomasello ordered two televisions from the informant after learning of his criminal history. Viewing the evidence in the light most favorable to the Government, United States v. Carson, 702 F.2d 351 (2d Cir.), cert. denied. 462 U.S. 1108 (1983), the jury was entitled to find that both Angellino and Tomasello thought that the informant was dealing in stolen merchandise.

3. Appellants next challenge their convictions on jurisdictional grounds, arguing that the Government failed to show that the offense affected interstate commerce. We find this contention meritless. Appellants stipulated that all the equipment they purchased from the informant had been manufactured outside of New York State and distributed from outside of the state. The nexus with inter-

state commerce is thus even more direct here than in United States v. Giordano, supra, in which we held that the Government could satisfy the jurisdictional requirement if it could prove that "any piano store in New York State is engaged in an activity affecting commerce." United States v. Giordano, supra, 693 F.2d at 250 (citations omitted) (footnote omitted). Here there are real rather than fictitious goods at issue, and they were conclusively shown by stipulation to have been transported in interstate commerce.

The absence of an instruction that appellants had to know the goods came from an interstate shipment was not error. We have expressly held that conspiring to violate 18 U.S.C. Section 659 is punishable "without proof that the defendants knew that there was federal jurisdiction of the offenses." United States v. Viruet, 539 F.2d 295,297 (2d Cir. 1976) (citing United States v. Green, 523 F.2d 229 (2d. Cir. 1975)).

4. It was proper for the District Court to admit evidence and a statement obtained in the warrantless search of Angellino's apartment. After his arrest, Angellino consented to the agents' entry into his apartment, where an agent saw and seized one of the videocassette recorders sold to Angellino by the informant. The videocassette recorder was clearly in plain view, but the record on appeal is silent as to whether the agent moved the equipment in order to read the model and serial number.

Under the "plain view" doctrine, a warrantless search and seizure is permitted if (a) the initial entry is justified by a recognized exception to the warrant requirement and (b) the officer has probable cause to believe the item is contraband. Arizona v. Hicks, 107 S. Ct. 1149 (1987). Both these requirements are satisfied here. Angellino consented to the agents' entry into his apartment, and the agents, aware of the defendants' conversations

with the informant, had probable cause to believe it was contraband.

The judgment of the District Court is affirmed.

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Circuit Judges

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District Judge